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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1971
No. 71-1572

JOANNE CARROLL BOWLING, SUSAN ARLENE SETTERS, VIVIAN G. FORTUNA and JOSEPH F. FERRERI,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioners were convicted of violating subdivision (a) of Section 647 of the Penal Code of the State of California, which provides as follows:

"647 Disorderly Conduct

Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

1.

(a) Who solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view."

Subsequent to being sentenced the Petitioners appealed to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles. The Appellate Department reversed in a written opinion on the strength of an opinion of the California Supreme Court in Barrows v. Municipal Court (1970) 1 Cal.3d 821, which held that Section 647(a) was an inappropriate charge where the lewd conduct occurred as part of a theatrical performance.

Upon petition of Respondent herein, the Appellate Department certified the cause to the District Court of Appeal pursuant to Rule 63(a) of the California Rules of Court. The order certifying the cause presented two questions to the Court of Appeal, whether Barrows v. Municipal Court, supra, prohibited prosecution under Penal Code Section 647(a) of dancers who participate

in a dance found to be hard-core obscenity because of the participation by them in an actual act of sexual intercourse as an integral part of said dance, and whether Barrows v. Municipal Court, supra, represented the present thinking of the higher appellate courts of California.

The District Court of Appeal, after argument, affirmed the judgments of convictions, holding in essence that the conduct of petitioners did come within the type of conduct prohibited in Penal Code Section 647(a), and did not factually come within the meaning of "theatrical performance" as used in Barrows v. Municipal Court, supra, and In re Giannini, 69 Cal.2d 563, 568.

Petitioners then petitioned the California Supreme Court for a hearing, wherein the alleged violation of Rule 64 of the California Rules of Court by the Court of Appeal was raised.

The California Supreme Court denied a hearing, which had the effect of affirming the opinion of the Court of Appeals opinion affirming the judgments of conviction. However, the California Supreme Court

ordered that the opinion of the Court of Appeal not be published, for the reason that said opinion cited an unpublished opinion. (Said opinion is nevertheless published as an appendix to Hern v. Short, ___ F. Supp. ___ [U.S.D.C. S.D. Tex. 1972, HANNAY].)

STATEMENT OF THE EVIDENCE

On September 10, 1970, Los Angeles Police Officer Douglas Monteith entered "The Bottoms Up" Bar at 5015 Melrose in the City of Los Angeles (R.T. p. 11, lines 14-22). Appellant Bowling stated, "We're having a live sex show on stage tonight. There will be a $5.00 admission fee." (R.T. p. 12, lines 14-15). Appellant Fortuno was behind the bar serving drinks (R.T. p. 13, lines 26-27).

A nude dancer was on the stage for approximately 35 minutes (R.T. p. 14, lines 6-7). When the dancer left, appellants Ferreri and Setters walked around in front of the bar and went up on the stage (R.T. p. 17, lines 10-11). Appellant Bowling selected a song from the jukebox as Ferreri

and Setters started to dance (R.T. p. 17, lines 16-20).

They removed each other's robe (R.T. p. 17, lines 22-24). They danced facing each other, caressing each other's body in the area of the thighs and the buttocks. At the end of four records they thrust their pubic areas towards one another and began moving their bodies (R.T. p. 18, lines 1-21).

Ferreri spread the robes in the middle of the stage. Setters laid down on the stage, moving her body to and fro and up and down. She motioned to Ferreri to come to her (R.T. p. 19, lines 5-26).

Ferreri laid on his side along Setters and began to fondle and caress her (R.T. p. 19, line 28 to p. 20, line 6). Ferreri took a position between the spread legs of Setters. He lowed his pubic area into Setters' pubic area and they moved their bodies up and down.

Setters reached down with her right hand and grasped Ferreri's erected penis and placed it in her vagina (R.T. p. 20, lines 20-24). There was actual penetration

of the penis into the vagina. The act of sexual intercourse lasted approximately 25 seconds (R.T. p. 21, lines 2-26). The music stopped playing and the appellants ceased their activity, put on their robes and left the stage (R.T. p. 21, line 20 - p. 22, line 2).

During the entire performance Bowling was in front of the jukebox making various selections (R.T. p. 22, lines 5-14).

On September 12, 1970, Monteith visited "The Bottoms Up". Ferreri and Setters were on the stage nude (R.T. p. 154, lines 4-5). The performance was basically the same as on the evening of Sept. 10 (R.T. p. 155, lines 6-28).

On October 10, 1970, Officer Pelch entered "The Bottoms Up". Fortuno asked him if he was there to view the performance (R.T. p. 170, lines 8-12). Bowling was making selections at the jukebox. As Ferreri and Setters performed in the nude his penis was in contact with her vaginal area (R.T. p. 171, line 9 - p. 172, line 13). They simulated an act of sexual intercourse (R.T. p. 206, lines 8-9).

On October 22, 1970, Officer Kuster entered "The Bottoms Up" at 9:30 p.m. Fortuno was at the entrance (R.T. p. 215, line 25). Ferreri and Setters, both nude, had their private parts pressed together and they were moving in a circular motion. Setters lay on her back and spread her legs. Ferreri took a position between her legs and once again placed his private parts against hers and they moved in a to and fro circular motion for approximately five minutes (R.T. p. 217, lines 5-26).

On November 14, 1970, Officer Kellerman went to "The Bottoms Up" (R.T. p. 412, line 23). Ferreri and Setters removed their robes. They were wearing G-strings. After dancing for several minutes, they removed the G-strings. They danced nude for 10 minutes during which their private parts were touching, they embraced and they were rubbing their bodies together (R.T. p. 416, lines 1-11).

Ferreri lay on top of Setters. Setters' legs were raised and her feet were on the upper back of Ferreri. They simulated sexual intercourse rubbing their private parts together in a rocking manner.

Ferreri reached down with his right hand and inserted his penis into Setters' vagina. The act of sexual intercourse lasted for approximately four minutes after which time Ferreri and Setters put on their robes and left (R.T. p. 417, lines 3-19).

Donald Radesky testified regarding a survey to ascertain the contemporary community standards of California (R.T. p. 446, lines 2-3). Two-thousand-five-hundred (2500) persons were contacted. One-thousand-eight-hundred (1800) answered questionnaires (R.T. p. 447, lines 7-10).

Radesky had the opinion that the conduct of appellants appealed to prurient interest (R.T. p. 585, line 25). The conduct went substantially beyond the customary limits of candor in description and representation (R.T. p. 586, lines 5-10). The predominant theme taking the performance as a whole is sex (R.T. p. 610, lines 23-24). As the "dance" progressed it became a vehicle to the ultimate culmination in an act of sexual intercourse. The culmination of this particular performance wiped out any redeeming social importance that it would have had at the beginning of

the "dance" (R.T. p. 642, lines 19-28; p. 543, line 3).

Appellant Ferreri testified that it was not necessary to have an act of sexual intercourse on stage in order to portray the "love of Ferreri and Setters (R.T. p. 122, lines 9-15). The purpose of the performance was to show the culmination of love between two people and the love and the feeling that Ferreri and Setters had for each other which culminated in an act of making love (R.T. p. 143, lines 9-13). Ferreri admitted that on some dates actual penetration took place (R.T. p. 123, lines 6-9).

James Kerans, a college professor, believed the performance had redeeming social value in that any dance that seriously reveals the meaning of life has a significant social factor (R.T. p. 154, lines 14-17). The entire exhibition was a progression to the final act of intercourse (R.T. p. 182, lines 4-6).

Martin Blinder believed the performance was primarily a dance display of the physical aspects of human love. It is an appeal to the fantasy of the person viewing it.

In effect, it attempts to create a feeling of physical love (R.T. p. 314, lines 22-26).

In Blinder's opinion it is possible to have sexual intercourse appeal to prurient interest (R.T. p. 322, line 3 - p. 325, line 3; p. 327, line 12). Sexual intercourse by two live performers on a public stage before an audience of normal average persons would bring an erotic response (R.T. p. 331, lines 5-6). If a person in the audience is normal, then acts of sexual intercourse would not be to a prurient appeal (R.T. p. 331, lines 17-21).

Blinder found "social redeeming value" in the performance in that it was a sexual outlet for those who have no others. There is social value because people pay money to get in. Some people may become erotically aroused and therefore they have a richer sexual life (R.T. p. 362, line 14).

Robert Wagner testified on rebuttal that one had to take the performance as a whole to consider it obscene (R.T. p. 544, lines 15-16). Patrons contribute to the appellants' conduct by watching. If their sole sexual outlet is just looking then

they are voyeurs (R.T. p. 546, lines 1-9).

The people putting on the sex act are exhibiting themselves in public. This partial sexual instinct in the role is exhibitionism. The average person might not be able to be an exhibitionist. Some of the male patrons might masturbate. The observer of the performance is bound to have some sexual stimulation (R.T. p. 546, lines 10-28).

There is sexual stimulation in looking at a "forbidden sex act". Such performance used to be a come-on in a house of prostitution. Men, after seeing the performance, would get their prostitutes and pay them money. Men in a bar have no such release. They are just voyeurs (R.T. p. 547, lines 1-12).

The men are participating in a mass sex act. They are attending an orgy merely as voyeurs. The only time this would have value would be in a house of prostitution where the men would get immediate and complete sex experience which would be psychologically normal (R.T. p. 549, lines 1-2).

The women in the performance are selling sex in public which is a very narrow step from becoming a prostitute (R.T. p. 550, lines 9-10). Wagner would classify the participants as prostitutes.

I

CERTIORARI SHOULD NOT BE GRANTED BECAUSE PETITIONERS HAVE PRESENTED NO SUBSTANTIAL FEDERAL QUESTION BY MERELY ALLEGING THAT THE CALIFORNIA COURT OF APPEAL DID NOT ADHERE TO THE CALIFORNIA RULES OF COURT

Petitioners urge this Court to review a conviction in a state court based solely on whether a state statute was properly applied. The allegations of Petitioners, that the Court of Appeal did not adhere to Rule 64 of the California Rules of Court hardly presents a Federal question, and this is made even more so clear by the denial of a hearing by the California Supreme Court, which had presented to it Petitioners' allegations.

Respondent's position is not aided by their adherence to the proposition that their conduct constituted a "theatrical

performance", thus bringing it within the prima facie protection of the First Amendment of the Constitution of the United States (Schact v. United States, 398 U.S. 58 [1970]), for such contention was factually rejected by the Court of Appeal and the California Supreme Court.

II

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED BY PETITIONERS' CLAIM THAT THE TRANSCRIPT WAS NOT TRANSMITTED TO THE COURT OF APPEAL

It should be noted that no facts have been established with regard to whether or not the transcript was transmitted pursuant to California Rules of Court, No. 64, there merely exists Petitioners' claim that it was not transmitted. Respondent questions what result could possibly be obtained by granting the petition for writ of certiorari, other than returning the case to the state court for determination of the claim.

Respondent submits that even if it were proven the transcript was not transmitted

physically one city block, from the building housing the Appellate Department to the building housing the Court of Appeal, such would not constitute failure of the Court of Appeal to reach a determination, for itself, of the obscenity of Petitioners' conduct. The opinion of the Court of Appeal makes clear that the court did determine for itself that the conduct was obscene and not constitutionally protected, as required by Zeitlin v. Arnebergh, 59 Cal.2d 901, Roth v. United States, 354 U.S. 476, and Jacobellis v. Ohio, 378 U.S. 184.

CONCLUSION

As can be seen from the STATEMENT OF THE EVIDENCE herein, this case presents a record of a complete trial. The case was tried on an obscenity theory under In re Giannini, 69 Cal.2d 563, and on the theory that the conduct was legally, under the First Amendment, a "theatrical performance" under Schact v. United States, supra. The "matter" was live sexual conduct, an area relatively unexplored by the courts compared to memorialized matter such as books,

films and magazines. The conduct was practically the ultimate obtainable. The transcript in large part consists of expert testimony on all elements of obscenity, prurient interest, contemporary community standards, and social value, including testimony of a psychiatrist, with many years experience in treating mentally disordered sex offenders, which dealt with the social effects of obscenity. In a case fairly bulging with potential and possible federal questions, petitioners have chosen to claim error by alleging that there was less than strict adherence to a court rule dealing with the preparation and transmittal of the record from one court to another.

No federal question is presented by petitioner's claim of error, and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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